86-1150

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

A. FRANK McMILLAN and
GLADYS BOTTROFF McMILLAN,

Petitioners,

v.

GOLETA WATER DISTRICT;
EDWARD G. MASCHKE; PATRICIA SHEWCZYK;
DONNA O. HONE; DONALD W. WEAVER;
JACK D. WALKER; and LLOYD C. FOWLER,

Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether property owners who allege the denial of all reasonable use of their residential lot due to the refusal of a government utility to turn on water through an existing meter connection are limited when asserting a "taking" claim to showing that they have been denied a property right in the receipt of water or may they claim a "taking" from the loss of the beneficial use of the property itself.

2. Whether a 1978 decision by a state appellate court which held that a 6-year old water moratorium did not effect an unconstitutional taking of the property of the plaintiffs in that case precludes the McMillans, who were not parties and were not in privity with the parties in the state court action, from relitigating in federal court the validity of the same moratorium, now 14 years old, on a claim that as applied to them, the moratorium violates their right to substantive due process.

3. Whether the conclusory statement, "Mr. McMillan has been treated in the same fashion under the District's ordinances, resolutions, and rules as all others similarly situated," by itself is sufficient to support the granting of summary judgment against both Mr. McMillan and his wife, as pro se litigants, on a claim for denial of equal protection.

PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the courts below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 792 F.2d 1453, and is reproduced in Appendix A to this petition.

The memorandum and order of the United States District Court for the Central District of California is not reported and is reproduced in Appendix B to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This is a cross-petition for certiorari filed pursuant to Supreme Court Rule No. 19.5. The petition for certiorari to which this cross-petition is related was received by counsel for the petitioners in this cross-petition on December 12, 1986.

———o———

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

Fifth Amendment, United States Constitution:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42, United States Code, Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Ordinance No. 72-2 of the Goleta Water District is reproduced in Appendix C.

The Responsible Water Policy Ordinance of the Goleta Water District is reproduced in Appendix D.

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STATEMENT OF THE CASE

Respondents, A. Frank McMillan and Gladys Bottroff McMillan, owned a residence supplied with domestic water by the Goleta Water District. In 1967, after the McMillans had demolished the existing residence to prepare for construction of new units on the property, the district turned off the water, but left all service facilities, including the meter, in place. The record of this case does not reveal why the water was turned off or who requested that action. Appendix (App.) 15. The McMillans did not proceed immediately with the construction of the new units and the lot remains vacant today.

In December, 1972, the water district enacted Ordinance No. 72-2, which imposed a moratorium on "new, additional, further, expanded or increase-in-size water service connections." App. 32. The ordinance also prohibited the provision of water "through any existing, installed water service facilities which were not used for furnishing any significant quantity of water for any bonafide [*sic*] purpose at any time within five years prior to December 7, 1972." App. 37. It was recognized by the courts below that this prohibition on water " 'through any existing, installed water service facility' " applied to the McMillans, who were not covered by the prohibition on "new water

connections." App. 3. Ordinance No. 72-2 allowed the Board of Directors of the water district to continue "in its discretion" to grant water service connections either on an appeal of a staff denial of an application, or as an exception to the moratorium. App. 39-40.

In May, 1973,[1] the water district adopted "The Responsible Water Policy Ordinance" (Policy Ordinance) which also prohibited "new or additional water service connections" under certain specified conditions. App. 46. On September 15, 1982, the McMillans applied to have the water turned back on using a form provided by the water district entitled: "APPLICATION FOR EXCEPTION TO ORDINANCE 72-2." App. 3. The water district charged the McMillans a $200 fee to accept and process this application. The Board of Directors conducted a hearing and denied the request for exception. App. 4. The McMillans requested reconsideration. The water district's general manager requested and received additional information from the McMillans and then denied reconsideration on November 12, 1982. App. 69. The case was filed May 2, 1983. App. 4.

The McMillans could not afford counsel and proceeded as pro se litigants. The District Court summarily dismissed their complaint, but the McMillans, still proceeding pro se, obtained a reversal from the United States Court of Appeals for the Ninth Circuit allowing them leave to amend their complaint. App. 4. The amended complaint pled claims in inverse condemnation, equal protection, and substantive due process and asserted federal jurisdiction

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[1] The reference by the Court of Appeals to 1983 as the date of this ordinance (792 F.2d at 1455, App. A3) is an error.

under 28 U.S.C. §§ 1331 and 1343(a). After the filing of the amended complaint the water district filed a motion for summary judgment and the District Court granted summary judgment to the water district on two claims and dismissed the third. Summary judgment was granted on the inverse condemnation claim on the basis that it was time barred because "[a]s early as 1973 or 1974 plaintiffs knew or should have known that their rights to continued water service had been interrupted by the District on other than a temporary basis." App. 24. The District Court dismissed the federal substantive due process claim on the basis that the court lacked "subject matter jurisdiction" because a state court had already ruled that no damages could be recovered on such a claim under California state law and that the proper remedy was a proceeding in mandamus which would be "inappropriate for this court to take up. App. 29. Summary judgment was granted on the equal protection claim because the court concluded that the McMillans in their opposition to the summary judgment motion had "not presented any evidence that their treatment by the District was motivated by anything other than a rational interest in upholding the moratorium." App. 30.

The Court of Appeals affirmed the summary judgment on the equal protection claim, reversed on the other two claims, and remanded the case to the trial court for further proceedings. App. 13. Although the Court of Appeals remanded the inverse condemnation and substantive due process claims, it stated in its opinion that both claims were controlled by the decision of the California

Court of Appeals in *Hollister Park Investment Co. v. Goleta County Water District,* 82 Cal. App. 3d 290 (1978), which had ruled that a "potential water user" could not assert an inverse condemnation claim. App. 7, 10.

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SUMMARY OF ARGUMENT

Although the Court of Appeals remanded for trial the McMillans' "taking" and substantive due process claims, it relied upon *Hollister Park, supra,* to narrow the issues. The state court in *Hollister Park* ruled that a potential water user could not assert the loss of a property interest due to the effect of the same moratorium and that no inverse condemnation action was recognized under state law. Since the McMillans were not parties and were not in privity with any of the parties in the *Hollister Park* case, they have not litigated and lost on any of the issues presented. Therefore, it was error for the Court of Appeals to bind the McMillans' federal "taking" and substantive due process claims to the ruling of the state court in *Hollister Park* that plaintiffs must be actual water users.

Summary judgment against the McMillans on the equal protection claim was improperly affirmed where the water district, as the moving party, had not presented to the trial court on that issue "facts as would be admissible in evidence" as required by Federal Rules of Civil Procedure, Rule 56(e).

ARGUMENT

I

APPLICABLE DECISIONS OF THIS COURT DO NOT ALLOW A DECISION BY THE CALIFORNIA COURT OF APPEAL IN A PRIOR CASE, WHICH UPHELD THE SAME MORATORIUM AGAINST A "TAKING" CLAIM BY OTHER PARTIES, TO LIMIT THE FULL LITIGATION IN FEDERAL COURT OF THE McMILLANS' FEDERAL DUE PROCESS AND "TAKING" CLAIMS

Although the Court of Appeals remanded the McMillans' substantive due process and "taking" claims to the District Court its opinion drastically narrowed the scope of litigation on these issues. Relying on *Hollister Park, supra,* the Court of Appeals stated that these claims turn on the factual question of whether the McMillans were "actual water users" or "potential water users." App. A6, A9. This ruling has two adverse effects on the McMillans. First, it limits their "taking" claim to "a property right to water service." Second, it restricts their federal substantive due process claim based upon a state court decision which refused to recognize an inverse condemnation claim for damages in a case brought by different parties against the same moratorium.

A. The McMillans Have Stated a "Taking" Claim Based upon Their Allegations of the Loss of all Reasonable Use of Their Property

The McMillans' "taking" claim is based on their allegation that the actions of the Goleta Water District have "pervented [*sic*] plaintiffs from making any and all reasonable use of their property." App. 63-64. They are not asserting a compensable property interest in water.

They are seeking to protect their property right to make reasonable economic use of their property. The Court of Appeals, however, adopted the ruling of the state court in *Hollister Park* that potential water users do not have an absolute right to receive water and therefore cannot state a claim for a "taking." App. 9. By binding the McMillans to this state court decision, the Court of Appeals deprived them of the "essentially ad hoc, factual inquir[y]" to which they are entitled under the decisions of this Court. *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978). Regardless of whether the McMillans are potential water users or actual water users or "constructive" water users, they are entitled to the opportunity to fully litigate their federal taking claim by proving that the water district's 14-year old moratorium does not "substantially advance legitimate state interests," *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980), and that the district's action as applied to their property has destroyed "economically viable use" of their lot, *id.,* and interfered with "distinct investment-backed expectations." *Penn Central,* 438 U.S. at 124; *Kaiser Aetna,* 444 U.S. at 175.

The right to raise this claim arises from the McMillans' status as owners of the real property to which the district's moratorium is being applied. It does not turn on the factual question of their status as water users at any given point of time. The opinion of the Court of Appeals limiting their "taking" claim to their status as water users is in conflict with the applicable decisions of this Court which allow a property owner to establish a taking claim with proof of the loss of all reasonable use of the property.

B. The McMillans Have Stated a Substantive Due Process Claim Based upon Allegations That the Water Emergency Is a Sham and the Moratorium Is Applied to Them for the Unlawful Purpose of Regulating Land Use

The Court of Appeals also limited the McMillans' due process claim. "If [the District Court] finds that [the McMillans] were only potential users, their substantive due process claim must fall in light of *Hollister.*" App. A9. The *Hollister Park* case, however, did not decide the due process issue. It addressed only the "narrow issue of the right of a landowner denied access to the facilities of a water district to recover in inverse condemnation for the diminution in value of his property caused by lack of water." 82 Cal. App. 3d at 292. The state court's holding was limited to its conclusion that under California case law, "the landowner is not entitled to damages in inverse condemnation." *Id.* The state court expressly left open the possibility of challenging the validity of the ordinance by use of "a petition for mandate." *Id.* at 294.

Although the brief *Hollister Park* opinion does not fully explain its reasoning, its holding and its reliance on *Selby Realty Co. v. City of San Buenaventura,* 10 Cal. 3d 110 (1973), suggest that it only follows the California rule later adopted by the California Supreme Court in *Agins v. City of Tiburon,* 24 Cal. 3d 266 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980), that the *remedy* for an inverse condemnation claim is limited to invalidation pursuant to a writ of mandate proceeding and does not include damages.

At the time *Hollister Park* was decided the 6-year old moratorium was being applied to the owner of "25 acres

of undeveloped real property . . . [which] was not serviced by the district." 82 Cal. App. 3d at 292. In the McMillans' case, the moratorium is now 14 years old and their allegations that the "water shortage emergency is and was a sham," App. 61, are based in part on the continuation of the moratorium for the additional 8 years. Also in this case the moratorium is being applied to prevent the only approved use of subdivided residential property which already has a service connection.

The McMillans were not in privity with any party in the *Hollister Park* litigation and did not participate in that case. Nonetheless, the Court of Appeals has ruled that their federal substantive due process claim is controlled by this eight-year old ruling of the state court that other parties could not on the circumstances which existed at that time state a claim for damages for inverse condemnation. The Court of Appeals by declaring the McMillans to be bound by the *Hollister Park* decision applied collateral estoppel in a manner in conflict with applicable decisions of this Court.

> "In both the offensive and defensive use situations, the party against whom estoppel is asserted has litigated and lost in an earlier action." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 329 (1979).

Since the McMillans have not previously "litigated and lost" the federal due process issue, they are entitled to litigate now without being limited by the *Hollister Park* decision.

> "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co.,* 439 U.S. at 327 n.7,

citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971); *Hansberry v. Lee,* 311 U.S. 32, 40 (1940).

II

SUMMARY JUDGMENT ON THE EQUAL PROTECTION CLAIM WAS IMPROPERLY UPHELD IN THE ABSENCE OF ANY FACTS AS WOULD BE ADMISSIBLE IN EVIDENCE TO DEFEAT THE CLAIM

The McMillans' equal protection claim is based on the principle that the water district is a special purpose body of limited powers to develop water sources and provide water service. Since the water district has no authority under state law to control growth, ordinances which discriminate between current users and eligible individuals who are not currently receiving water for the purpose of limiting growth within the district do not bear a rational relationship to a legitimate state interest.

The McMillans attached to their complaint examples of campaign literature for candidates to the water district Board of Directors which set forth growth control and opposition to new water sources for the district as the principal campaign issues. App. 71-74. In their opposition to the motion for summary judgment, the McMillans included various materials including an official ballot argument on a water district ballot measure. This ballot argument, signed by Robert E. Goodwin in his official capacity as "Attorney for Goleta Water District," expressly stated that the 1973 water moratorium initiative was "designed to keep an increasing demand for new housing, industry and expanded agriculture in balance with our limited local water supplies." Excerpt of Record in the Court of Appeals (E.R.), Tab 31, Exhibit No. 11 at 1. The Court

of Appeals acknowledged that the McMillans had submitted evidence on this point but characterized it as "speculation that the moratorium was enacted and continued in furtherance of an illegitimate 'no growth' policy. App. 6 n.3. While the Court of Appeals discounted the McMillans' evidence, it did not mention that no "facts as would be admissible in evidence," Fed. R. Civ. P. 56(e), were submitted by the water district to support its motion for summary judgment on this claim.

In its moving papers, the only purported "evidence" set forth by the water district on the equal protection claim was a conclusory statement in the points and authorities which was adopted by reference in a perfunctory affidavit of the water district general manager:

> "Mr. McMillan has been treated in the same fashion under the District's ordinances, resolutions and rules as all others similarly situated." E.R., Tab 30, Page No. 10.

This statement does not conform to the requirements of Rule 56(e) for several reasons. First, it is conclusory and sets forth no "facts as would be admissible in evidence." It is well established that "[w]hile admissible opinion evidence in an affidavit in support of a motion for summary judgment may be considered in exceptional circumstances . . . conclusions in an affidavit are not proper and will not be considered." *Mapco, Inc. v. Carter,* 573 F.2d 1268, 1282 (Temp. Emerg. Ct. of App.), *cert. denied,* 437 U.S. 904 (1978). This is particularly important where the affidavit is from an interested party such as the general manager of the defendant water district, whose credibility should be considered by the trier of facts.

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944).

Second, the declaration is technically deficient because it refers only to "Mr. McMillan." It does not establish by facts that that reference was intended to and could include Gladys Bottroff McMillan.

Third, and most importantly, the McMillans' equal protection claim addresses the district's policy of refusing to provide any water to those not currently receiving it while not restricting the approved levels of use by current residents of the district. The statement which was incorporated by reference in the general manager's declaration merely indicates that Mr. McMillan was treated the same "as all others similarly situated." It does *not* say that the McMillans are being "treated in the same fashion" as all other persons who own residential property in the district. Therefore the declaration does not establish that no triable issues of fact exist on the claim by the McMillans that they and all other similarly situated persons not currently receiving water are being denied equal protection of the law.

It is not suggested that the McMillans, as pro se litigants, are entitled to special, favorable treatment. However, under these circumstances the water district should not be allowed any shortcuts around the rules governing summary judgment motions. The water district as the moving party presented no facts suggesting that the McMillans and others similarly situated were being treated equally and fairly under the district's ordinances. Although the McMillans' evidence may not ultimately prove their claim, at the current state of the proceedings

it stands unrefuted to establish genuine issues of material fact as to whether the district is discriminating against them for the illegitimate purpose of conducting a growth control program.

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CONCLUSION

If the petition for writ of certiorari in *Goleta Water District, et al. v. A. Frank McMillan and Gladys Bottroff McMillan* (No. 86-985) is granted, this cross-petition should be granted for the reasons set forth above.

DATED: January, 1987.

Respectfully submitted,

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APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A. FRANK MCMILLAN and GLADYS MCMILLAN,

Plaintiffs-Appellants,

v.

GOLETA WATER DISTRICT, EDWARD G. MASCHKE, PATRICIA SHEWCZYK, DONNA O. HONE, DONALD W. WEAVER, JACK D. WALKER, and LLOYD C. FOWLER,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California

The Honorable Richard A. Gadbois,
District Judge, Presiding

Argued and submitted March 5, 1986
Pasadena, California

No. 85-5894

D.C. No. CV83-2746-RG

Filed: June 30, 1986 Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: PREGERSON, POOLE, and THOMPSON,
Circuit Judges.

POOLE, Circuit Judge:

I

OVERVIEW

Frank and Gladys McMillan appeal the summary judgment of their 42 U.S.C. § 1983 claim for inverse condemnation and violations of their equal protection and substantive due process rights. The McMillans argue on appeal that (1) the Goleta County Water District ("Water District") took their property without just compensation by applying a water service moratorium to deny their application for water service; (2) the Water District subjected them to disparate treatment for an illegitimate governmental purpose; and (3) the Water District and the district court denied them substantive due process by relying on a California state court decision holding that the moratorium did not effect an unconstitutional taking of property. We affirm the dismissal of the equal protection claim, and reverse on the statute of limitations and due process issues.

II

FACTS AND PROCEEDINGS

In 1966, the McMillans acquired real property located within the Goleta County Water District. At that time, a residence on the property was supplied with water through a meter installed by the Water District. In 1967, the McMillans began to redevelop the property and to demolish the residence, and the water service was officially disconnected. Due to financial difficulties, the McMillans did not complete the redevelopment. In 1968, the Water District installed a new water meter on the property, but no water has been used on the property since 1967.

In December 1972, the Water District's board of directors declared the existence of a water shortage emergency, and enacted Ordinance No. 72-2, which imposed a moratorium on new water connections. The moratorium applied to the McMillans' property even though there was a "connection" (water meter) on the property, inasmuch as Section 9 of the Ordinance provided that

> [w]ater service shall not be provided through any existing, installed water service facilities which were not used for furnishing any significant quantity of water for any bonafide (sic) purpose at any time within five years prior to December 7, 1972, unless an applicant for water service through said facilities has satisfied the conditions of Sections 2, 3, 4 or 5 of this ordinance.

In May 1983, the Water District's voters adopted by referendum a "Responsible Water Policy Ordinance" also prohibiting new water connections during times of water shortage. On September 15, 1982, the McMillans formally applied to the Water District for renewal of their water service, claiming eligibility under Ordinance 72-2, Section 13.[1]

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[1]Ordinance 72-2, Section 13 allows the Water District, in its discretion, to grant permits allowing for water service otherwise prohbited if it finds that

> (1) the restrictions herein would cause an undue hardship or emergency condition or (2) that the granting of the permit will not adversely affect the water supply or service to other existing water consumers or (3) that due to peculiar facts and circumstances, none of the provisions of this Ordinance authorizing new water service are applicable to the situation under consideration, if the Board of Directors in its discretion finds that the applicant is entitled to substantially similar treatment as set forth in some provision of this Ordinance * * *.

After a hearing, the Water District's board of directors denied the McMillans' request for an exception to the moratorium. The Water District's general manager denied the McMillans' request for reconsideration of their application on the basis of hardship.

On May 2, 1983, the McMillans commenced this action against the Water District and several of its officers and employees. The district court dismissed the complaint for failure to state a claim upon which relief can be granted and for failure to properly allege subject matter jurisdiction. The McMillans appealed the dismissal, and this court remanded the case to the district court with instructions to grant the McMillans leave to amend their complaint to allege that they were at least "constructive" users of water.[2] The McMillans amended their complaint, alleging that they "at all times were actual users of water." They also alleged that their substantive due process rights were violated because the moratorium was irrational and a "sham" and that their equal protection rights were violated because other applicants were granted hardship exceptions while they were not. They requested damages for violations of their civil rights, interim damages for the temporary taking of their property, and an order directing the Water District to provide water service to the property. The Water District filed an answer to the amended complaint, alleging, *inter alia,* that the plaintiffs failed to state a claim upon which relief

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[2]*McMillan v. Goleta Water District,* No. 83-6024 (9th Cir. June 19, 1984) (memorandum disposition) acknowledged that mere "potential" water users had no property interest under California law subject to protection under the United States Constitution.

could be granted, that the district court lacked subject matter jurisdiction, that the claim was barred by the statute of limitations, and that the district court should abstain from exercising its jurisdiction. On May 3, 1985, the district court granted summary judgment to the Water District on the inverse condemnation and equal protection claims, and dismissed the substantive due process claim for lack of subject matter jurisdiction. The McMillans timely appealed.

III

DISCUSSION

A. Standard of Review

Summary judgment is appropriate if, viewing the evidence in the light most favorable to the opposing party, the district court finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Triangle Mining Co. Inc. v. Stauffer Chemical Co.*, 753 F.2d 734, 738 (9th Cir. 1985). This court reviews *de novo* a district court's order of summary judgment. *Id.* This court also reviews *de novo* a district court's order dismissing a claim for lack of subject matter jurisdiction, favorably viewing the facts alleged to support jurisdiction. *Boettcher v. Secretary of Health and Human Services,* 759 F.2d 719, 720 (9th Cir. 1985).

B. Equal Protection Claim

Appellants assert that their right to equal protection was violated because applying the moratorium to them served no legitimate governmental purpose. However,

they have set forth no evidence showing that the Water District's motivation was other than a rational interest in upholding the moratorium.[3]

> The mere showing of some discrimination by the state is not sufficient to prove an invasion of one's constitutional rights. * * * However, absent a suspect classification or invasion of fundamental rights, equal protection rights are violated only where the classification does not bear a rational relationship to a legitimate state interest.

Construction Industry Ass'n, Sonoma City v. City of Petaluma, 522 F.2d 897, 906 n.11 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976). Inasmuch as the McMillans have not alleged the existence of a suspect classification or an invasion of fundamental rights, no genuine issue of material fact exists regarding their equal protection claim. Consequently, we affirm the district court's grant of summary judgment on the equal protection claim.

C. Inverse Condemnation Claim: The Statute of Limitations

In remanding this case to the district court, we directed that

> After the complaint is amended, the district court should explicitly consider whether the statute of limitations bars suit for discontinuation of actual or "constructive" use of water service. Also, if necessary, it should consider whether California law recognizes a property right to water service for constructive users

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[3]The primary "evidence" the McMillans set forth is speculation that the moratorium was enacted and continued in furtherance of an illegitimate "no growth" policy.

> and whether the district court should abstain from deciding this case under the doctrine established in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

McMillan v. Goleta Water District, 738 F.2d 447 (9th Cir. 1984) (memorandum disposition), at 1455. In their amended complaint, appellants alleged that they were actual users of water at the time the moratorium was declared. In its memorandum and order on remand, the district court assumed, for purposes of applying the statute of limitations, that "plaintiffs could provide sufficient evidence to create a triable issue of fact whether they were actual (or 'constructive') users and not merely potential users."

The proper statute of limitations for this action is one year. *Wilson v. Garcia*, 105 S.Ct. 1938, 1949 (1985) (all Section 1983 claims are best characterized as personal injury actions); Cal. Code Civ. Proc. § 340(3) (statute of limitations for a cause of action for personal injury in California is one year). The district court here, before *Wilson v. Garcia* was decided, borrowed California's five-year statute under Code of Civil Procedure Section 336 governing actions for mesne profits of real property. Under either statute of limitations, appellants' claim would be barred if the cause of accrued in 1973 and 1974 (as asserted by appellees), and would not be barred if it accrued when the Water District issued the final denial of appellants' application on November 12, 1982 (as asserted by appellants). Thus the determinative issue is whether the cause of action accrued in or before 1974, or on November 12, 1982.

The district court determined that the McMillans' claim arose in 1973 or 1974 when they knew or should have known that their rights to continued water service had been interrupted on other than a temporary basis. In so doing, the district court relied on *Mosesian v. County of Fresno,* 28 Cal.App.3d 493, 104 Cal.Rptr. 655 (1972), which held that an inverse condemnation claim accrues when the taking is objectively complete, not when the claimant is subjectively convinced that the taking is permanent rather than temporary. The district court considered the Water District's final refusal of the McMillans' claim significant only insofar as it caused the McMillans to become subjectively convinced of the permanence of their water deprivation. Under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* — U.S. —, 105 S.Ct. 3108 (1985), this was error.

> As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Id. at 3117.[4] The rationale for this rule is that "[i]f [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional

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[4]Note that finality differs from exhaustion of remedies, which is not a prerequisite for suits predicated on 42 U.S.C. § 1983. *See Williamson County,* 105 S. Ct. at 3120.

questions." *Id.* (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n. Inc.*, 452 U.S. 264, 297 (1981)). Thus the appellants' taking claim accrued on November 12, 1982, and consequently their commencement of this action on May 2, 1983 was not barred by the statute of limitations.

D. Substantive Due Process

Appellants assert that the district court erroneously dismissed their substantive due process claim in reliance on the conclusion implicit in *Hollister Park Investment Col. v. Goleta County Water District,* 82 Cal.App.3d 290, 147 Cal.Rptr. 91 (1978), that the water moratorium was rationally related to a legitimate government purpose, i.e. water conservation and development. Appellants assert that it was error to compel them to accept the *Hollister* decision as determinative of their federal taking claim, because they were not involved in the *Hollister* litigation.

The decision of the California Court of Appeal in *Hollister* was based on the premise that "[a] *potential* water user does not possess 'an absolute right to be treated in the same manner as existing water consumers within [a] water district * * *.'" 82 Cal.App.3d at 294, 147 Cal. Rptr. at 93 (emphasis added). Thus *Hollister Park* stands for the proposition that Goleta's water moratorium is constitutional *as applied* to *potential users* of water. Yet here the district court did not determine whether the McMillans were actual water users, as they contended, or whether they were merely potential users. *Hollister* is applicable only once this determination is made. Therefore the district court's dismissal of the McMillans' substantive due process claim in light of *Hollister* was erroneous, and is reversed and remanded for the district

court to determine whether the McMillans were actual or potential water users. If it finds that they were only potential users, their substantive due process claim must fall in light of *Hollister*. If it finds that they were actual users, the district court will be faced with the issue, left undecided by both the United States Supreme Court and the Ninth Circuit, whether property owners can recover damages for inverse condemnation. In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636-61 (1981), a majority of the Supreme Court indicated it "apparently is of the opinion—contrary to that of the California Supreme Court in [*Agins v. City of Tiburon*, 24 Cal.3d 266 (1980)]—that damages *are* recoverable for inverse condemnation." *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1148 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983) (emphasis in original) (*Martino* also refrained from deciding whether property owners could recover damages for inverse condemnation). However, because the Supreme Court concluded that it lacked jurisdiction in *San Diego Gas*, it did not decide the issue whether a state "must provide a monetary remedy to a landowner whose property allegedly has been 'taken' by a regulatory ordinance claimed to violate the Just Compensation Clause of the Fifth Amendment." *San Diego Gas*, 450 U.S. at 623. *See also Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980).

E. Abstention

The appellees argue that the district court should have abstained under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The application of the *Pullman* doctrine is at the sound discretion of the trial

court. *Bank of America National Trust and Saving Association v. Summerland County Water District,* 767 F.2d 544, 546 (9th Cir. 1985).

Pullman abstention is appropriate when three tests are met.

> (1) The complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."
>
> (2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."
>
> (3) The possibly determinative issue of state law is doubtful.

Canton v. Spokane School District #81, 498 F.2d 840, 845 (9th Cir. 1974), citing *Pullman; Midkiff v. Tom,* 702 F.2d 788, 789 n.1 (9th Cir. 1983), *rev'd on other grounds, sub nom. Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984).

The allocation of water during times of water shortage is a sensitive area of social policy. *See Summerland,* 767 F.2d at 546. Thus the first *Pullman* criterion is met. Whether the second and third criteria are fulfilled requires analysis of the precedential value of *Agins v. City of Tiburon,* 24 Cal. 3d 266, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980). In *Agins,* the California Supreme Court was "persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged," *id.*

at 275, 157 Cal. Rptr. at 376, and "that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." *Id.* at 276-77, 157 Cal. Rptr. at 378. The Court reasoned that

> Community planners must be permitted the flexibility which their work requires. * * *
>
> [T]he utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary. * * * The weighing of costs and benefits is essentially a legislative process. In enacting a zoning ordinance, the legislative body assesses the desirability of a program on the assumption that compensation will not be required to achieve the objectives of the ordinance. * * * Legislation in the nature of zoning can be and has been enacted by the people through a direct initiative. Are the voters, through the initiative power, also to have this unwelcome power to *inadvertently* commit funds from the public treasury?

Id. at 275-76, 157 Cal. Rptr. at 377 (emphasis in original). However, the precedential value of *Agins* has been called into doubt. *See Bank of America National Trust and Saving Association v. Summerland County Water District,* 767 F.2d 544, 547 (9th Cir. 1985) (after *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 660-661 (1981), "*Agins* stands on something of a precedential precipice.") If the California state courts would conclude that *Agins* applies solely to zoning ordinances, and not to the water moratorium ordinance, and if the McMillians recover just compensation via an inverse condemnation

action, then the need for constitutional adjudication by the federal court would be obviated.[5]

However, a federal court need not abstain merely because there exists the abstract possibility that state courts might render adjudication of the federal question unnecessary. *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 237. *See also Midkiff v. Tom*, 702 F.2d at 789-790, n.1. Consequently the district court did not abuse its discretion by failing to abstain.

IV

CONCLUSION

The grant of summary judgment to the Water District on the equal protection claim is affirmed. The dismissal of the substantive due process claim is reversed, as is the dismissal of the taking claim as time-barred.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

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[5]Under California law, inverse condemnation claims based on the *taking* of private property are subject to a five-year statute of limitations. Cal. Code Civ. Proc. §§ 318, 319 (West 1982). *See Garden Water Corp. v. Fambrough*, 245 Cal. App. 2d 324, 328 53 Cal. Rptr. 862, 864-65 (1966); *Frustuck v. City of Fairfax*, 212 Cal. App. 2d 345, 373-74 28 Cal. Rptr. 357, 374-75 (1963); *Ocean Shore R.R. Co. v. City of Santa Cruz*, 198 Cal. App. 2d 267, 270-72 17 Cal. Rptr. 892, 894-95 (1961). However, inverse condemnation claims based on "acts of *trespass or injury* to property which do not involve the taking or damaging of private property for a public use" are subject to a three-year statute of limitations (Cal. Code Civ. Proc. § 338, subd. 2 (West 1982)). *Frustuck*, 212 Cal. App. 2d at 374, 28 Cal. Rptr. at 375 (emphasis added). *See also Leaf v. City of San Mateo*, 104 Cal. App. 3d 398, 405 n.2, 163 Cal. Rptr. 711, 715 n.2 (1980); *Garden Water*, 245 Cal. App. 2d at 328, 53 Cal. Rptr. at 864-65; *Ocean Shore*, 198 Cal. App. 2d at 270-71, 17 Cal. Rptr. at 894. Because the McMillans' state inverse condemnation claim would apparently be based on a taking rather than on a trespass, the five-year statute of limitations would apply, so their state suit would not be time-barred.

APPENDIX B

MEMORANDUM AND ORDER

IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

A. Frank McMillan and Gladys Bottroff McMillan

Plaintiffs,

v.

Goleta Water District, Edward G. Maschke, Patricia Shewczyk, Donna O. Hone, Donald W. Weaver, Jack D. Walker, Lloyd C. Fowler,

Defendants.

No. CV 83-2746 RG

Filed: May 1, 1985 Clerk, U.S. District Court
Central District of California

This matter came before the court for a hearing on April 22, 1985, regarding defendants' motion for summary judgment under Federal Rule of Civil Procedure 56. Having taken the matter under submission, the court has carefully considered the arguments raised at the hearing and in the parties' briefs, declarations, and other supporting papers. For the reasons stated below, the court shall enter summary judgment for defendants on plaintiffs' claims for inverse condemnation and violation of their rights to equal protection under the fifth and fourteenth amendments, and shall dismiss plaintiffs' remaining claims for violations of their right to substantive due process, as these claims are not properly before this court.

BACKGROUND

This is an action for inverse condemnation arising from the refusal of the Goleta Water District (the "District") to supply water service to plaintiffs' property in Santa Barbara County. This court originally dismissed plaintiffs' complaint for failure to state a claim upon which relief can be granted and for failure properly to allege subject-matter jurisdiction. On June 19, 1984, however, the United States Court of Appeals for the Ninth Circuit remanded the case with instructions to permit plaintiffs to amend their complaint. Because it now appears that plaintiffs' takings claim is time-barred, that their due process claim cannot be entertained by this court, and that any equal protection claim discernable from their pleadings is deficient as a matter of law, the court again determines that defendants are entitled to judgment as a matter of law.

The undisputed facts, construed in the light most favorable to plaintiffs, can be summarized as follows:

Plaintiffs Frank and Gladys McMillan purchased the property in question in mid-1966 and in June of 1967 demolished the existing structure — a duplex — with the intention of subdividing the lot and developing six housing units. Although the District had been providing water service to the property since 1961 to its previous owner, all water usage ceased soon after the McMillans took over the land, apparently because of their construction plans. In 1967 the water service was officially disconnected (at whose request is unclear), thereby relieving the McMillans of any obligation to pay the monthly basis meter charge that is assessed even if no water is used. In 1968, however, the meter was replaced; a

new one remained intact until 1983, when defendants ordered it removed and took plaintiffs off their "active status" billing accounts.

With the exception of a leak in 1973 no water has been used on the property since the date when service first stopped. Plaintiffs could have had their water service restored any time before 1972. But they chose not to do so, evidently because their development plans were sidetracked by other projects in the years immediately following purchase of the property.

On December 21, 1972, the District's board of directors adopted an ordinance imposing a moratorium on new water connections because of an alleged imbalance between the District's steady supplies and existing demands. Under that ordinance water service would not be renewed for any existing facility unless during the previous five years a significant quantity of water had been used for a *bona fide* purpose. If water service had been disconnected, then the District would routinely treat a request for renewal as an application for new water service, requiring the applicant to qualify under the ordinance's hardship exception. In May of 1973 the District's voters adopted by referendum a "Responsible Water Policy Ordinance" also prohibiting new water connections during a time of water shortage.

Although the McMillans did not make any written application for the restoration of water service until 1982, the record clearly shows that soon after the moratorium went into effect plaintiffs became aware that the service would not be restored to their property because of the moratorium. Mr. McMillan admits in his deposition that "I do recall trying (the faucet) several times and there

was no water available after the '72 moratorium . . . I did try at different times to turn the meter on and evidently the meter was shut off according to the records." Plaintiffs allege they made repeated verbal requests after the moratorium to have their water service renewed. Mr. McMillan also avers that beginning in 1974, he made regular visits to the water board to inquire about the status of the moratorium and the possibility of its being lifted. Plaintiffs contend they postponed any additional action, such as applying for an exception, because they believed any such request would be futile and were deceived by the District's representatives into thinking that the ordinance would be repealed at any time — once the water emergency had ended.

In any event, on September 15, 1982, the McMillans formally applied to the District for renewal of water service through their inactive meter. In the application for an exception to the moratorium, McMillan provided the following explanation of the circumstances entitling him to renewed service and to immediate action by the District:

> . . . Discontinuance of service was due to demolition of old duplex no longer fit for a residance [sic] . . . Due to financial reverses in the 60's I could not complete building of the duplex. . . . Had I known there would be a water moratorium I would not have had the service disconnected. We want water to rebuild former existing buildings on the property. A sale is pending on our getting water to the property. (Property is valueless without water.)

The board denied the request on October 7, 1982, after hearing the McMillans' testimony and reviewing the

records of his account, as well as other evidence. The minutes of that meeting reveal that the only stated basis for the board's decision was their view that McMillans' request would constitute a new use not permissible under the ordinance.

In remanding the case to this court, the Ninth Circuit offered the following guidance:

> . . . [We] assume that the district court interpreted the complaint to allege only that the McMillans were *potential* users of water when service was denied. Under California law, while an actual user of water apparently does have a property right that is taken if water service is discontinued, a potential user of water has no such property right. . . .
>
> At oral argument, . . . the McMillans asserted that they sought to allege that they were actual, or at least more than mere "potential," users of water. . . . [T]he McMillans should be granted leave to amend their complaint to allege that there were actual or constructive users of water.
>
> . . . After the complaint is amended, the district court should explicitly consider whether the statute of limitations bars suit for discontinuation of actual or "constructive" use of water service. Also, if necessary, it should consider whether California law recognizes a property right to water service for constructive users and whether the district should abstain from deciding this case under the doctrine established in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

Plaintiffs filed their first amended complaint on August 28, 1984. This complaint together with the other papers filed by plaintiffs can be construed as asserting the following claims for relief. First, plaintiffs allege that the District's actions amounted to an inverse condemnation

of their property and a taking under the fifth amendment. Thus plaintiffs now contend that they were *actual* users of water at the time the moratorium began and defendants refused to restore water service, rendering plaintiffs' property valueless. Second, plaintiffs evidently claim a violation of their substantive due process rights, contending that the moratorium was irrational and a "sham." Plaintiffs allege that the emergency conditions said to support the measure do not exist in reality and amount to nothing more than a thinly-disguised excuse for pursuing a "no growth" policy toward construction. Finally, plaintiffs appear to claim their rights to equal protection have been violated in that other appliants have been granted hardship exceptions while plaintiffs were not. All of these claims are asserted not only against the District but also against several individuals who are officers or employees of the District.

DISCUSSION

A. Plaintiffs' Claims For Inverse Condemnation Are Barred By The Statute Of Limitations.

The Court of Appeals in its memorandum disposition first instruct this court to consider whether the applicable statute of limitations bars suit by plaintiffs for "discontinuation of actual or 'constructive' use of water service." The court presumes that this phrase refers to the McMillans' primary claim for inverse condemnation based on the imposition of the water moratorium. For the purposes of applying the statute of limitations, the court will assume that plaintiffs could provide suffficient evidence to create a triable issue of fact over whether they were actual (or "constructive") users and not merely potential users.

In determining the appliable limitations period for an action in inverse condemnation brought, as here, under 42, U.S.C. § 1983 (the Civil Rights Act of 1871), federal courts must apply the most analogous state statutes of limitations. *See Bradshaw v. Zoological Society of San Diego,* 569 F.2d 1066, 1068 (9th Cir. 1978). Under California law a suit for inverse condemnation based on a "taking" rather than a "damaging" of property is subject to the five-year limitations period of California Code of Civil Procedure, § 336. *Garden Water Corporation v. Fambrough,* 245 Cal.App.2d 324, 327-8, 53 Cal.Rptr. 862, 864-5 (1966); 2 B. Witkin, *California Procedure* (2d Ed. 1970), § 323 at 1167-68. Hence, plaintiffs' takings claim, filed May 2, 1983, would be time-barred if the cause of action arose before May 2, 1978 and the statute of limitations was not otherwise tolled. As indicated below, the court finds that the claim matured well before 1978 and that the statute should not be tolled by virtue of any alleged representations of the District regarding the length of or need for the moratorium.

California law holds that "(t)he cause of action ordinarily accrues when, under the substantive law, the wrongful act is done and the obligation or liability arises, i.e., when a suit any be brought." 2 *Witkin, supra,* § 263 at 1116 (emphasis omitted). In order to apply the general rule in this case, the court must determine, first, if the inverse condemnation claim arose at the time plaintiffs' application for an exception was formally denied in 1982, at the time the moratorium first went into effect in 1972, or at some point in between; and second, whether the circumstances of this case fall within the "continuing

wrong'' doctrine, application of which would permit plaintiffs to bring suit any time over the life of the moratorium.

In deciding when a cause of action for inverse condemnation arises, California courts have expressed a preference for the view that the taking is complete and the statute begins to run once the interference with plaintiff's property right is permanent in an objective sense. In *Mosesian v. County of Fresno,* 28 Cal.App.3d 493, 104 Cal.Rptr. 655 (1972), plaintiffs had recovered damages from the defendant county for an inverse condemnation that occurred when three acres of land held by plaintiffs' predecessor-in-interest were used as a ponding area as part of a residential subdivision plan imposed by county. Plaintiffs did not bring their administrative claim until eleven years after the completion of excavation and work in the area, although they filed their lawsuit in state court immediately upon rejection of that claim. The court of appeal decided the suit was barred by the then-applicable one-year statute of limitations despite plaintiffs' contention that until the administrative decision they did not know subjectively whether the taking was a fee interest and permanent or merely an easement and temporary. 28 Cal.App.3d at 501-2, 104 Cal.Rptr. at 660-1.

The *Mosesian* court's lengthy approach to this problem is instructive for this case:

> The amorphous concept of when a cause of action arises in an inverse condemnation claim has been treated in a number of cases. Notwithstanding some inconsistencies in the language of the cases, each makes clear that the time is not limitless. None supports Mosesians' contention that though a taking is objectively total and the improvement complete, the

> time for filing a claim is postponed until the claimant is subjectively convinced the taking is permanent rather than temporary. None suggests, as Mosesians contend herein, that there must be a judicial determination of permanency before the time within which a claim must be filed starts to run. None suggests that an uncertainty with respect to whether a fee or easement is being claimed by the public agency justifies postponement of filing a claim.

28 Cal.App.3d at 501, 104 Cal. Rptr. at 660-1. *See Aaron v. City of Los Angeles,* 40 Cal.App.3d 162, 491-2, 115 Cal. Rptr. 162, 176 (1974) (claim for inverse condemnation based on jet noise from local airport arises once defendant's activities substantially interfere with use and enjoyment of plaintiff's property and result in diminution of market value, although plaintiffs may postpone suit until situation has stabilized), *cert. denied* 419 U.S. 1122 (1975); *Wyoming State Highway Department v. Napolitano,* 578 P.2d 1342, 1350-1 (Wyo. S.Ct. 1978) (claim matures when plaintiff knows or should have known that taking is complete, based on factors such as "when the taking is apparent or discoverable" or "when there is substantial interference resulting in a decline in market value."), *appeal dismissed,* 439 U.S. 948.

Under the objective test the court can disregard the McMillans' claim that they did not know the taking of their water rights was permanent until the District formally rejected their hardship application in 1982. This is no more persuasive than was the claim in *Mosesian* that the invasion of plaintiffs' land could not be final until

there had been an administrative finding as to the nature of the state's interest. To the contrary, the taking here occurred once it became clear that the moratorium actually applied to plaintiffs' property and could not be considered a temporary measure, for it would logically be at this time that the ordinance substantially interfered with the marketability of the land.

The factual record before the court supports a finding that the McMillans' cause of action for inverse condemnation arose well before May, 1978, the relevant date five years before plaintiffs filed suit. To begin with, plaintiffs' own admissions flatly contradict any assertion that they might now make that they were unaware the moratorium applied to them. Plaintiffs urge they were actual users of water when the measure took effect and made repeated verbal requests to have the water turned back on, all unsuccessful because of the moratorium. Further, assuming plaintiffs were entitled to believe in 1972 that the moratorium would be short-lived, this good faith belief could not last forever. The moratorium was adopted not only by the District's board in December of 1972 but also by the voters of the District themselves in May of 1973. No annual renewal vote by either body occurs; the moratorium stays in effect until the District votes to lift it. Finally, unlike some inverse condemnation cases in which the invasion of plaintiff's property is gradual in nature and not easily discoverable at first, here there was a total deprivation of water service as soon as the

measure went into place. As early as 1973 or 1974 plaintiffs knew or should have known that their rights to continued water service had been interrupted by the District on other than a temporary basis.[1]

The court must additionally reject plaintiffs' position that the moratorium gave rise to a "continuing wrong" such that plainiffs could bring a takings claim at any time. Two cases have dealt directly with this issue, reaching different results: *Ocean Acres Limited v. Dare County Board of Health,* 707 F.2d 103 (4th Cir. 1983), which refused to find a continuing wrong; and *Lockary v. Kayfetz,* 587 F. Supp. 631 (N.D. Ca. 984), which did apply the doctrine. For reasons explained below the court adopts the analysis of *Ocean Acres.*

In *Ocean Acres* a developer brought an action against defendant county challenging its adoption of a septic tank ban as a taking of property and a violation of due process. The court, in rejecting plaintiff's argument that it had a right to damages accruing throughout the life of the moratorium, held that it did not constitute a continuing wrong and reasoned thus:

> ... Although it is indisputable that the moratorium was in existence until March 1978, this fact does not end the inquiry of whether the "continuing wrong" exception applies ... "The particular policies of the

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[1]Indeed, "assuming the law sanctions postponement of filing a claim until the claimant subjectively knows the taking is permanent," *Mosesian,* 28 Cal.App.3d at 502, 104 Cal.Rptr. at 661, the record would not support plaintiffs' claim that this did not occur until 1982. Rather, as earlier discussion of the facts indicated, the McMillans early on regarded any request to have water service restored as futile. *Cf. Mosesian,* 28 Cal.App.3d at 503, 104 Cal.Rptr. at 662.

> statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged must all be considered." . . .

. . . Plaintiff was aware of the actions taken by the county and of the impact of those actions on its proposed development. The general partners were advised that issues could be litigated; in June 1972 they wrote a letter . . . requesting information on the septic tank ban . . . Although it may be apparent in hindsight that the decision to develop the property was ill-advised, a "continuing wrong" theory should not provide a means of relieving plaintiff from its duty of reasonable diligence in pursuing its claims.

707 F.2d at 106-7 (citations omitted).

Lockary involved a situation even more similar factually to the one involved in the McMillan action. Plaintiffs, owners of undeveloped land in the unincorporated coastal community or Bolinas, brought suit to challenge a 12-year old moratorium on new water hook-ups pursuant to a declared "water emergency." The court rejected the defendants' statute of limitations defense and held the continuing wrong exception provided a basis for any claim arising out of the enforcement and enactment of the moratorium. The court wrote:

> [T]he continuing wrong exception does provide a basis for maintaining plaintiffs' claims with respect to the water moratorium itself. That exception provides that "where a continuous chain of events or course of conduct is involved, the cause of action accrues at the time of the final act in that series of events or course at conduct." *Barbaccia v. County of Santa Clara*, 451 F. Supp. 260, 266 (N.D. Cal. 1978), *citing*

U.S. v. Dickenson, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947). "The purpose of the rule is not only to avoid multiple actions but to allow aggrieved property owners to assess the full extent of their losses before filing suit." *Id.*

Reading the complaint in the light most favorable to plaintiffs' the continuation of the moratorium can reasonably be said to constitute a continuing wrong. At the heart of the complaint is the contention that, although a temporary water moratorium is one thing, an "emergency" lasting twelve years is a taking. They allege that it is the unlawful duration of the moratorium which constitutes the continuing wrong.

587 F. Supp. at 635-6.

The court declines to adopt *Lockary's* application of the continuing wrong doctrine to plaintiffs' inverse condemnation claim. What the analysis in *Lockary* fails to acknowledge is that under controlling California law the wrong involved in a taking is complete once the invasion of plaintiff's right is permanent in an objective sense, even if that taking is accomplished through the means of a moratorium. The moratorium may be continuing, but the cause of action for inverse condemnation accrues as soon as the property owner knows or should have known that his rights have been substantially interfered with. To be sure, one can challenge a moratorium such as that involved here at any time on the ground that it is unconstitutional because it lacks a rational basis; this is the gist of the McMillan's substantive due process claims. In the case of such a general challenge, the wrong continues so long as the law is in place. But as far as an inverse condemnation claims goes, any damage suffered by plaintiffs was caused when the ban was originally enacted and

applied to plaintiffs' property. "A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." *Ward v. Caulk,* 650 F.2d 1144, 1147 (9th Cir. 1981). *Cf. Pierpont Inn, Inc. v. State,* 70 Cal.2d 282, 293, 74 Cal.Rptr. 521, 528-9 (1969) (owner of condemned property entitled to postpone suit until completion of state project in order to assess damages).

Finally, the court should not rule that the statute of limitations was tolled because of continual representations by the District's officials that a water emergency existed and the moratorium was only temporary. The Ninth Circuit has stated: "To avoid the bar of litigation by invoking the concept of fraudulent concealment, the plaintiff must allege facts showing affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." *Rutledge v. Boston Woven Hose & Rubber Co.,* 576 F.2d 248, 250 (9th Cir. 1978). Here, the allegations regarding statements about the existence of a water emergency, even if accepted at face value, would be irrelevant to the issue of fraudulent concealment. *Cf. Ocean Acres,* 707 F.2d at 105 (claim that county exaggerated basis for septic tank ban would not amount to fraudulent concealment). A constitutional claim for taking does not depend on proof that the state lacked a valid purpose in acting as it did; the only question is whether the state took a property right without providing just compensation. Further, assuming that representations as to the duration of the moratorium could have somehow concealed from plaintiffs the existence of an inverse condemnation claim, the McMillans' allegations in

this regard are entirely conclusory and unsupported by any admissible evidence. *See Lockary,* 587 F. Supp. at 635. Indeed, plaintiffs appear to concede that any belief they had in the short duration of the water moratorium actually derived from a misplaced hope that the District's board would be replaced by pro-growth candidates at the next election.

B. Plaintiffs' Substantive Due Process Claim Should Not Be Heard By This Court.

Hollister Park Investment Co. v. Goleta County Water District, 82 Cal.App.3d 290, 147 Cal.Rptr 91 (1978), involved an identical constitutional challenge to the very moratorium at issue in this case. Plaintiff there asserted an inverse condemnation claim, which was rejected on the ground that plaintiff was only a potential user of water. 82 Cal.App.3d at 294, 147 Cal.Rptr. at 93. In addition, as here, the plaintiff contended that the Goleta ordinance was unconstitutional because it had been continued on an irrational basis. The California court's disposition of this contention controls the McMillans' due process claims:

> The landowner seeks to avoid the inevitable impact of controlling precedent by arguing that in reality the ordinances represent the adoption of a "no growth" policy in the form of a studied and deliberate plan to avoid acquisition of sufficient water resources to serve new customers of the district. (see *Swanson v. Marin Mun. Water Dist., supra,* 56 Cal. App.3d 512, 524, 128 Cal.Rptr. 485). That argument misconstrues the ordinances and initiative. Ordinances 72-1 and 72-2 represent interim legislation which was replaced by the initiative. The initiative does not prohibit the district's acquisition of new water sources. To the contrary, it mandates that the

> district seek additional sources of water. It permits denial of access to district water to new users only when there is a drought caused emergency. The only restriction upon the development of the new sources is voter approval of their cost. In essence, then, the initiative represents a moratorium upon new service connections during drought conditions while a feasible and financially acceptable plan for expansion is developed. *Damage to the landowner caused by the moratorium is not compensable. Its remedy if the board of the district does not carry out the obligation imposed by the statute lies in a petition for mandate. (Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, 125, 109 Cal.Rptr. 799, 514 P.2d 111; see also *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 53, 125 Cal.Rptr. 365, 542 P.2d 237.)

82 Cal.App.3d at 294, 147 Cal.Rptr. at 93 (emphasis supplied).

Under the authority of *Hollister Park,* then, the plaintiffs should pursue any remedy they might have through the procedures outlined under California Code or Civil Procedure § 1085. It would be wholly inappropriate for this court to take up the complex task of administering the affairs of the Goleta Water District. Indeed, to the extent that plaintiffs actually seek by this action an order requiring the District to search out new water sources or otherwise justify the continuation of the water moratorium, this court would be required to abstain from deciding the matter. *Kolisman v. City of Los Angeles,* 737 F.2d 830, 833-4 (9th Cir. 1984), *cert. denied* — U.S. —, 105 S.Ct. 1179. The court, therefore, orders that plaintiffs' claims for violation of the rights to substantive due process be dismissed for lack of subject-matter jurisdiction.

C. Plaintiff Has Failed To Show The Existence Of Any Triable Issue Of Fact With Regard To Its Apparent Equal Protection Challenge.

In addition to their other allegations, plaintiffs apparently claim in their opposition papers that they have been denied the equal protection of the laws in that others were granted hardship exceptions but not plaintiffs. It hardly needs stating that this fact alone does not make out a valid equal protection claim. As the Ninth Circuit has stated:

> The mere showing of some discrimination by the state is not sufficient to prove an invasion of one's constitutional rights. Most legislation to some extent discriminates between various classes of persons . . . However, absent a suspect classification or invasion of fundamental rights, equal protection rights are violated only where the classification does not bear a rational relationship to a legitimate state interest.

Construction Ind. Ass'n, Sonoma City v. City of Petaluma, 522 F.2d 897, 906 n.11 (9th Cir. 1975), *cert. denied* 424 U.S. 934 (1976). The McMillans have not presented any evidence that their treatment by the District was motivated by anything other than a rational interest in upholding the moratorium by refusing to renew service through a long inactive water meter. The denial of water service to the plaintiffs, while it may impose an obstacle to their ability to resell their property, does not in and of itself constitute a violation of their rights to equal protection under the fourteenth amendment.

Accordingly, it is HEREBY ORDERED THAT summary judgment be entered for defendants on plaintiffs'

claims for inverse condemnation and denial of equal protection and that plaintiffs' claim for violation of their right to substantive due process be dismissed.

RICHARD A. GADBOIS, JR.
United States District Judge

DATED: 1 May 1985

APPENDIX C

ORDINANCE NO. 72-2

GOLETA COUNTY WATER DISTRICT PROHIBITIONS AND RESTRICTIONS ON NEW WATER SERVICE CONNECTIONS

BE IT ORDAINED BY THE BOARD OF DIRECTORS OF THE GOLETA COUNTY WATER DISTRICT AS FOLLOWS:

SECTION 1. PROHIBITION ON NEW SERVICE CONNECTIONS, FACILITIES AND CONSUMPTION.

No new, additional, further, expanded or increase-in-size water service connections, meters, main extensions or other water service facilities of any kind, shall be made, allowed, approved or accepted after December 7, 1972, except as expressly provided herein. Hereafter, the phrase "new water service facilities" shall be deemed to refer to and include each of the above. The uses restricted and prohibited herein are found by the Board of Directors to be nonessential.

SECTION 2. PROVISIONS FOR FACILITIES INCLUDING MAIN EXTENSIONS APPROVED PRIOR TO DECLARATION OF EMERGENCY.

Any applicant who filed a written application for new water service facilities which include or require new or extended District mains, paid all fees and charges required by the District, filed the requisite construction plans, bonds, guarantees and all other necessary documents, and performed all other things required by the

District's rules and regulations, all on or before December 7, 1972, shall be entitled to proceed with the construction and installation of said new water service facilities, and all further new water service facilities reasonably and necessarily appurtenant thereto, and to have water service supplied therethrough, provided that both of the following additional conditions are also fulfilled:

(1) The Applicant actually, bonafidely and significantly commences the construction or installation of said new water service facilities within 120 days from December 7, 1972; and

(2) The Applicant obtains the issuance of a certificate of occupancy for each structure to be served by said water service facilities on or before December 6, 1973, provided that in the event that on that date certificates of occupancy have been issued for some, but not all, of the structures shown on the plans of file with the District, water service shall be allowed for those structures which have certificates of occupancy, but not to the remainder of said structures. In furtherance of this provision, the Board of Directors may in its discretion authorize changes in the design and construction of said facilities necessary to effectuate water service provided the number of water service connections is not increased.

None of the District's standard form letters customarily sent to the Planning Department of the County of the City of Santa Barbara indicating that the Applicant's project is within the District and is entitled to water service subject to the rules and regulations of the District to establish any right to water service facilities, connections or service prohibited by this Ordinance.

SECTION 3. PROVISIONS FOR NEW FACILITIES NOT INCLUDING MAIN EXTENSIONS APPROVED PRIOR TO DECLARATION OF EMERGENCY.

(a) Any Applicant for new water service facilities not requiring new or extended District mains who paid all fees and charges, and performed all other things required by the District's rules and regulations, all on or before December 7, 1972, shall be entitled to proceed with the construction and installation of said new water service facilities, and to have water service supplied therethrough, provided that all of the following conditions are also satisfied:

(1) The Applicant files a written application for a building permit with the Santa Barbara County or City Building Department within 120 days from December 7, 1972; and;

(2) The Applicant thereafter obtains the issuance of a building permit pursuant to said application, and thereafter constructs a building pursuant to the terms of said building permit.

(b) Any Applicant for new water service facilities not requiring new or extended District mains who filed an application for a building permit with the Santa Barbara County or City Building Department on or before December 7, 1972, shall be entitled to proceed with the construction and installation of said water service facilities, and to have water service supplied therethrough, provided that all of the following conditions are also satisfied:

(1) The Applicant applies and pays all fees and charges and performs all other things required by the District's rules and regulations for said new water

service facilities, within 120 days from December 7, 1972, and;

(2) The Applicant obtains the issuance of a building permit pursuant to said building permit application, and thereafter constructs a building pursuant to the terms of said building permit.

SECTION 4. PROVISIONS FOR NEW FACILITIES FOR IRRIGATION PURPOSES.

The Board of Directors may in its discretion upon written application made within 120 days from December 7, 1972, permit any applicant for new water service facilities primarily for irrigation purposes to install such new water service facilities and to receive water service therethrough provided that on or before December 7, 1972, said applicant actually, bonafidely and significantly commenced the construction or installation of an irrigation system or other improvements or facilities reasonably necessary for agricultural uses, to the extent and subject to such terms and conditions as the Board in its discretion deems reasonable.

SECTION 5. MASTER METERS.

No new service connections shall be permitted to be made to any master meter, or any water facilities or lines served through a master meter, serving two or more dwellings, commercial, industrial, recreational, institutional or educational units, structures, or parcels, after December 7, 1972, unless the water consumer applies to the Board of Directors for such connections, within 120 days from December 7, 1972, and the Board of Directors

finds, in its discretion, that the Applicant has actually, bonafidely and significantly commenced the construction or installation of water service facilities to be connected to such master meter, or other improvements or substantial activities in preparation therefor, equivalent to those set forth in Sections 2, 3 or 4.

SECTION 6. FIRE HYDRANTS, MAINS AND LINES.

Notwithstanding any other provision of this Ordinance, no restriction or prohibition is imposed upon applicants, approvals or installations solely for fire hydrants, fire mains or fire lines for fire protection reasons, and which do not require any other new water service facilities prohibited hereby.

SECTION 7. TEMPORARY SERVICE.

(a) CONSTRUCTION WORKS

Notwithstanding any other provisions of this Ordinance, no restriction or prohibition is imposed upon applications, approvals or installations of water service facilities solely for temporary service to those construction works which are entitled to permanent water service facilities under the terms of this Ordinance.

(b) OTHER TEMPORARY SERVICE

Notwithstanding any other provisions of this Ordinance, no temporary water service facilities shall be approved or installed for circuses, bazaars, fairs, temporary restaurants, or other temporary uses, except upon written application to the Board of Directors which may,

in its discretion, allow such use if it finds that the quantity of water to be consumed by such temporary use will not significantly adversely affect water supply or service to other existing water consumers.

SECTION 8. REPLACEMENT AND REPAIR OF EXISTING FACILITIES.

Notwithstanding any other provisions of this Ordinance, no restriction or prohibition is imposed upon the repair of existing water service facilities or the replacement of existing water service facilities with new water service facilities of the same type, size and capacity.

SECTION 9. RESTRICTION ON SERVICE THROUGH EXISTING INACTIVE FACILITIES.

Water service shall not be provided through any existing, installed water service facilities which were not used for furnishing any significant quantity of water for any bonafide purpose at any time within five years prior to December 7, 1972, unless an applicant for water service through said facilities has satisfied the conditions of Sections 2, 3, 4 or 5 of this Ordinance.

SECTION 10. CONTINUED PROCESSING OF APPLICATIONS.

Notwithstanding any other provision in this Ordinance, District staff shall continue to process applications for new water service facilities prohibited hereby, collect the ordinary fees and charges and conduct the necessary reviews of plans, and render advise and assistance to applicants, and place such applications in a priority sequence for later Board action; provided that staff shall

not approve any such applications or plans, shall not fix or accept any bonds or guarantees, and shall not inspect any water facilities nor collect any inspection fees, and shall not refer any proposals for main extension outside of dedicated rights of way to the Board of Directors for approval.

In filing his application and paying fees pursuant to any authority under this Section, the applicant will be required to acknowledge in writing that the acts of staff described herein do not constitute an acceptance or approval of such water service facilities and that the applicant acts at his own cost, expense and risk of loss, and agrees to and does waive and release any claim or demand against the District, its officers, directors, employees, and agents for any such cost, expense, loss or damage resulting from the refusal to accept, approve or serve water through said facilities, and waive and release any claim of right to have said facilities finally accepted, approved, connected or supplied water therethrough by reason of such processing activities.

When and if the Board of Directors declares that the water shortage emergency has ceased, unless directed otherwise by the Board of Directors, staff will thereafter finalize the processing of any previously filed applications in the order of priority previously established.

SECTION 11. REQUIREMENT FOR INFORMATION.

Applicants for new water service facilities shall be responsible for providing all information and proof requested by the Board of Directors of District staff for use in processing, verifying or enforcing any matter provided

for herein, and the applicants shall do so at their sole cost and expense. Any failure to provide requested information or proof shall be grounds for denial of any application or relief.

SECTION 12. FUTURE RESTRICTIONS.

All applicants for water service facilities are hereby put on notice that further restrictions or prohibitions on water use and service may hereafter become necessary, and nothing herein, and no application, permit or approval of any water service or water service facilities granted pursuant to these rules shall vest in the applicant any right to a particular use or quantity of water, but such applicant shall be subject to all further prohibitions, restrictions, rules and regulations in the same manner and extent as any other consumer or class of consumers similarly situated existing at the time such prohibitions or restrictions are imposed.

SECTION 13. APPEAL AND EXCEPTIONS BY PERMIT.

(a) APPEALS. Any applicant for water service facilities may appeal any decision or application of the provisions of this Ordinance by District staff, to the Board of Directors by filing a written appeal with the District Secretary within 10 days from the date of the decision or application appealed from, and the Board of Directors shall set the matter for hearing at a regular or special meeting within 30 days from the date the request for review is filed, and may in its discretion thereafter affirm, reverse or modify the staff's decision, and impose any conditions it deems just and proper, if it finds the

decision to be erroneous or that the applicant would suffer undue hardship or emergency as a result thereof.

(b) EXCEPTIONS BY PERMIT. The Board of Directors of the Goleta County Water District may in its discretion grant permits for water service facilities otherwise prohibited hereby, if it finds and determines that (1) the restrictions herein would cause an undue hardship or emergency condition or (2) that the granting of the permit will not adversely affect the water supply or service to other existing water consumers or (3) that due to peculiar facts and circumstances, none of the provisions of this Ordinance authorizing new water service facilities are applicable to the situation under consideration, if the Board of Directors in its discretion finds that the applicant is entitled to substantially similiar treatment as set forth in some provision of this Ordinance authorizing new water service facilities. Such permits may be granted only upon application in writing therefore, after public hearing, notice of which is published once at least five (5) days prior to such hearing, in a newspaper of general circulation within the District, except that the Board of Directors may in its discretion dispense with the writing, public hearing, and publication requirements if it finds that an emergency condition requiring immediate action exists. Upon granting any such permit, the Board of Directors may impose any conditions it determines to be just and proper. Said permit shall be prepared in writing, the original to be kept on file with the District and a copy to be furnished to the applicant.

SECTION 14. PENALTIES.

(a) It shall be a misdemeanor for any person, firm, association, partnership or corporation to use or apply water received from this District contrary to or in violation of any restriction or prohibition contained in this Ordinance, and upon conviction thereof such person, firm, association, partnership or corporation shall be punished by being imprisoned in the County Jail for not more than 30 days or by fine of not more than Three Hundred ($300.00) Dollars, or by both such fine and imprisonment, for each violation and for each day of a continuing violation.

(b) Any person, firm, association, partnership or corporation willfully violating any restriction or prohibition of this Ordinance shall be subject to having water service discontinued to the affected property, after having been given reasonable notice and an opportunity to be heard to protest against the findings of such willful violation and the discontinuance of service.

SECTION 15. DEFINITIONS.

The terms applicant and consumer used herein shall apply to every person, firm, partnership, association, corporation, city, county, state or local agency, political subdivision, district, or entity of every kind.

SECTION 16. REPEALER OF PRIOR ORDNANCE.

Goleta County Water District Ordinance 72-1, adopted December 7, 1972, is hereby revoked and rescinded.

SECTION 17. SEVERABILITY.

If any section, sub-section, sentence-clause or phrase of this Ordinance is for any reason held to be unconstitutional or invalid such decision shall not affect the validity of the remaining portions of this Ordinance. The Board of Directors hereby declares that it would have passed this Ordinance and each section, sub-section, sentence, clause or phrase thereof irrespective of the fact that any one or more sections, sub-sections, sentences, clauses or phrases be unconstitutional or invalid.

Vote on the Ordinance by roll call vote resulted as follows:

AYES: Harry G. Iddings, Jr.
Dee Pagliotti
Llana H. Sherman
Max L. Feldman

NAYS: None

ABSENT: Jose R. Martinez

DATED: December 21, 1972

APPROVED:
MAX L. FELDMAN, President

ATTEST:

(SEAL)

ROSINA C. PETERSON, Secretary

APPENDIX D

FULL TEXT OF "THE RESPONSIBLE WATER POLICY ORDINANCE" PREAMBLE

The people of the Goleta County Water District, County of Santa Barbara, State of California, do ordain and enact the following ordinance; which shall be called "The Responsible Water Policy Ordinance", and whose objectives are:

(1) To cause the Goleta County Water Board to adopt policies which conserve local water resources;

(2) To cause the Goleta County Water Board to cancel and rescind any contract, commitment or policy leading to the importation of water until such time as the voters shall have approved the financing thereof; and

(3) To cause the appropriate governing bodies to give the voters of the Goleta County Water District an early opportunity to approve or disapprove the financing of alternative new sources of water, including, but not limited to, importation of water from outside the County of Santa Barbara.

PROVISIONS

A. Definitions

1. The definition of a word applies to any of its variants.

2. "District" means the Goleta County Water District, County of Santa Barbara, State of California.

3. "Board" means the Board of Directors of the Goleta County Water District.

4. "Works" includes but is not limited to water works, conduits, reservoirs, storage sites, watersheds, machinery, wells, pumps, dams, storage tanks, tunnels, hydrants, meters, works and facilities for the transportation of water, other appliances and their appurtenances needed thereby.

5. "Conduit" shall include canals, channels, pipes, ditches, flumes and any other means by which water flows or is conveyed from one point to another.

6. "Water originating from sources outside the County of Santa Barbara" shall include all surface and subterranean water which flows or is conveyed by conduits and works, or any combination thereof, from a point outside the boundaries of the County of Santa Barbara to a point inside said County except such water situated in the watershed of the Santa Ynez River, and its tributaries in the State of California, which flow naturally from a point outside the County of Santa Barbara to a point inside said County.

7. "California State Water Plan" shall include that system for conveying water from Northern and Central California to Southern California as implemented by the Burns-Porter Act, Cal. Stat. 1959, Ch. 1762.

8. "Safe annual yield" is the amount of water that can be withdrawn from the groundwater basin within the Goleta County Water District without exceeding the aveage annual replenishment of such water.

9. "Cachuma Project" consists of the Cachuma Dam and reservoir on the Santa Ynez River, the Tecolote Trans-Mountain Diversion Tunnel and the South Coast

Conduit built under provisions of a master contract between the Santa Barbara County Water Agency and the United States acting by and through the Bureau of Reclamation of the Department of the Interior.

B. Conservation of Water.

Unless and until the voters of the District have voted affirmatively to assume and pay for any and all costs to be incurred by the District or its inhabitants by reason of:

(a) The importation and distribution of water from sources outside the County of Santa Barbara; or

(b) The development and distribution of water from specific sources other than from the groundwater basin within the district or from the District's annual allotment from the Cachuma Project;

the Board shall not purchase, use, acquire or distribute an amount of water which shall exceed the combined total of (a) the District's total annual allotment from the Cachuma Project; and (b) the safe annual yield from the groundwater basin within the boundaries of the District.

C. Approval of Specific Sources.

The Board shall immediately take all steps necessary to explore the feasibility and ascertain the cost of any and all sources of water not currently being used by the District and shall make such information available to the voters of the District at the earliest available time.

Any proposal submitted to the voters for the purposes of authorizing the Board to develop, use, acquire, or purchase additional sources of water shall accurately state immediate and long term costs to be incurred in connection with the implementation of such a proposal.

D. Importation of Water.

Unless and until such time that the voters of the District shall have voted affirmatively to pay any and all costs incurred by the District to import water originating from sources outside the County of Santa Barbara:

(1) The District shall not acquire, use, purchase or distribute water originating from sources outside the County of Santa Barbara including, but not limited to, water delivered in whole or part through conduits which are part of the California State Water Plan;

(2) The Board shall cancel, annul and rescind any contract, declaration, resolution, policy statement or any other action wherein the Board has expressed its approval of, or commitment to, the acquisition, use, purchase or distribution of water originating from sources outside the County of Santa Barbara, including, but not limited to, water delivered in whole or part through conduits which are part of the California State Water Plan.

E. Emergency Water Restrictions.

During any emergency caused by drought, or other threatened or existing water shortage, the Board shall promptly:

(1) Deny applications for new or additional service connections which are not in existence at the time the emergency is deemed to exist;

(2) Not annex any land to the District; and

(3) Exercise all powers granted to the Board under the provisions of the California Water Code.

F. Special Election.

This initiative ordinance shall be submitted immediately to the voters of the District at a special election called for that purpose.

G. Liberal Construction.

This ordinance shall be liberally construed to effect the purposes and objects thereof.

H. Severability.

Should any portion of this initiative ordinance be declared invalid for any reason whatsoever by and Court having jurisdiction, the invalidity of such portion shall not be deemed to invalidate any remaining portion of this initiative, and each provision and clause shall be construed as an independent provision and shall not depend for its legality or effect on the portion invalidated.

I. Reservation of Water Rights.

This ordinance shall not be deemed to affect any rights which the District or its residents may have to any funds collected for the purpose of reserving rights to the importation of water originating from sources outside the County of Santa Barbara.

J. Effective Date. This ordinance shall be effective immediately.

APPENDIX E

A. FRANK McMILLAN
GLADYS BOTTROFF McMILLAN
2361 Broadmoor
Palm Springs, California 92264

TELEPHONE: (619) 328-2504
(619) 320-4335

In Propria Persona

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

A. FRANK McMILLAN and GLADYS BOTTROFF McMILLAN, Plaintiffs, VS. GOLETA WATER DISTRICT, EDWARD G. MASCHKE, President PATRICIA SHEWCZYK, DONNA O. HONE, JACK D. WALKER, LLOYD C. FOWLER Defendants.	83-2746 RG (mcx) AMENDED COMPLAINT FOR DAMAGES UNDER THE CONSTITUTION OF THE UNITED STATES AND FEDERAL CIVIL RIGHTS ACT (JURY TRIAL DEMANDED) (Filed Aug. 28, 1984)

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In Propria Persona

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

A. FRANK McMILLAN and GLADYS BOTTROFF McMILLAN,

Plaintiffs,

vs.

GOLETA WATER DISTRICT, EWARD G. MASCHKE, President PATRICIA SHEWCZYKE, DONNA O. HONE, JACK D. WALKER, LLOYD C. FOWLER,

Defendants.

83-2746 RG (mcx)

AMENDED COMPLAINT FOR DAMAGES UNDER THE CONSTITUTION OF THE UNITED STATES AND FEDERAL CIVIL RIGHTS ACT

Plaintiffs hereby allege against defenants as follows:

PRELIMINARY STATEMENT

1. Goleta is a small, city located just out side the corporated limits of the City of Santa Barbara, California, in the County of Santa Barbara. It is notorious throughout the area for its efforts to discourage development.

2. Plaintiffs have owned property and paid taxes on property in Goleta since 1966. We are people who

simply want to re-build on our property in Goleta but have been denied ay opportunity by the defendants, who have deliberatly misused the limited governmental powers available to them.

3. Plaintiffs have been formally prevented from making any reasonable use of their property in part through a blanket denial on water connections to the defendants utility's water system. This ban on water connections is based on the maintenance of a sham water emergency and the pretense of a water shortage.

4. Recognizing that water is essential to human life and residential construction, and because the powers of the defendant utility district offered the best means of turning governmental authority against growth, defendants have maintained the bogus "water emergency" in place for more that 11 years.

5. While the defendant's actions in nurturing a extending their "water emergency" have been concealed from the plaintiffs, after these many years enout of defendants' actions are now known to demonstrate that the "water emergency" continues at the will of the defendants. For example:

a. the "emergency" has continued unabated for 11 years, no matter how much water was available, and even in times of torrential rains;

b. successful candidates for the water district ran on promises to block growth through continuance of the "emergency".

JURISDICTION AND VENUE

6. The Court has jurisdiction of this matter pursuant to constitutional provisions, statutes, and otherwise:

a. this Court his jurisdiction under the provisions of 28 U.S.C. - 1331a in that the plaintiffs' claims for relief arise unter the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and more specifically those clauses of those amendments protecting free speach, access to government, and freedom of association as well as thoses amendments protecting property from being taken for public use without payment of just compensation to the owner, and protecting citizens from being deprived of rights without due process of law and without equal protection of the laws, as more fully appear hereinafter;

b. the claim for relief herin arises under the Civil Rights act of 1871 (42 U.S.C. 1981) et. seq. and particularly Section 1983, as well as the First, Fifth and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction of this matter pursuant to 28 U.S.C.-1331 and 1343(a).

7. The violations and unlawful acts hereinafter discribed occurred in the County of Santa Barbara, which is located in the Central District of California. Venue for the prosecution of this action is therefore properly lain in the United States District Court for the Central District of California pursuant to 28 U.S.C.-1391(b).

PARTIES

8. Plaintiffs, A. Frank McMillan and Gladys Bottroff McMillan, are a married couple and owners of real property located a 576 Apple Grove Lane, also know as Parcel $ 51 - 262 - 17, 18, and 19 inclusive. It is located just ourside the corporated limits of the City of Santa Barbara, California. In the Goleta Water Districe, a map is attached here to as Exhibit A.

9. Defendant, Goleta Water District is a public utility district organized and serving as a minor, local political subdivision of the State pursuant to statutes of the State of California.

10. Goleta's Board of Directors consists of elected or appointed public officials holding office pursuant to state statute and the directors are charged with the responsibility and enjoy the authority to administer the affairs of a public utility district pursuant to state statute.

11. At all times alleged herein, director defendants and each of them acted in concert, to insure that plaintiffs would be deprived of their constitutionally protected rights, freedom of association, access to governmental bodies as well as their property without just compensation, in a non legislative capacity. Further, defendants have denied plaintiffs due process and equal protection under the law.

12. Defendant, Goleta Water District and director defendants are without authority or power to set policy or to adopt, enact or regulate land use planning within the district.

13. At all times alleged herein director defendants were acting either outside their legislative capacity or as individuals acting outside the scope of their authority.

14. If the alternative, should it be determined that director defendants acts were legislative functions, then plaintiffs allege that the individual directors, as subordinate public officials, are not immune from liability for deprivation of constitutionally protected rights.

15. Goleta Water District has by statute limited governmental powers and functions for the purposes of providing utilities to the district served.

16. Goleta Water District is a public utility district organized under State statute for the purpose of providing utility services, in this case water to the district serving Goleta.

17. The State of California has declared that the water of the state is vested for the beneficial use of the people of the state and has declared that the water districts organized as "special purpose districts" or "public utilities" are governmental entities operating at the local level to give force and effect to the states water policies.

18. The state has a declared policy of seeking to develop water resources as well as the avoidance of waste in the states water supply and sources.

19. The actions and jurisdictions of Goleta Water District and its directors, directly impact and affect all real property within the district.

20. The acts and omissions of defendants as alleged herin were in most instances covert acts committed in furtherance of defendants plan and policy and practice to

deny plaintiffs their constitutionally protected rights and could not have been made known and were not made known to plaintiffs until some time after September of 1982. When the plaintiffs filed (against the will of the defendants) for water under hardship clause of the moratorium.

STATEMENT OF FACT

21. Plaintiffs, A. Frank and Gladys Bottroff McMillan are owners of fee simple land in Goleta Water District. The property was purchased by plaintiff in 1966. People were living in the house and water was on the property at the time of purchase. Plaintiffs were actual users of water, the first meter was installed on the property in September of 1958. Water had been contracted for by the developer of that area. Plaintiffs signed up for service with Goleta Water District in March of 1966, and became actual consumers of water at that time. The "Old Fanny Stevens" home place was on the property. In June of 1967 the home was demolished and Plaintiffs began plans for subdivision of three lots and securing plans for construction of six units.

22. In June of 1967 the meter was turned off due to a leak. In 1968 the defendants installed a new meter.

23. Plaintiffs recieved subdivision maps and permits from the City of Santa Barbara to hook up to the sewer. Plans were still on the drawing board when the 1972 water moratorium was inacted by the defendants.

24. On several occasions after the moratorium the plaintiffs asked the defendants to re-instate the flow of water, but always recieved a negative reply.

25. Plaintiffs at all times expected, reasonably planned and intended to develop and utilize the property for re-construction consistent with residential zoning and building requirements.

26. Plaintiffs in good faith reliance upon the representations of defendants Goleta Water District, and upon the relative position of knowledge authority and expertise of defendants believed the emergency and moratorium to exist and as residents in the are at that time did not wash the car, ect. therefore we were reluntant to push the issue for water earlier. It was only since 1982 that we realized that our rights and property had been denied due to a "sham" emergency moratorium. To the plaintiffs it was as if another, "Water Gate Cover Up" had been exposed *and we were the victims.*

27. Defendants in frutherance of a predetermined resolve that plaintiffs would recieve no opportunity to reasonably develop or use any part of their property did act in a knowing, arbitrary, capicious, willfull and discriminatory manner by:

a. acting to create and maintain conditions purpoting to constitute a water emergency for 11 years;

b. instituting and maintaining conditions which give rise to the moratorium without any intent to remedy and terminate the moratorium;

c. deliberate, repeated delay and evasion to the need for replacement and development of water supply, transmissions, and resources;

d. willful failure to give force and effect a mandatory regulations and requiremants.

28. defendants and each of them promoted a policy and plan to restrict and prohibit development of unimproved real property within Goleta. The plan was implemented in spit of the fact that community planning, zoning and development was specifically within the primary jurisdiction of the County of Santa Barbara.

29. Since 1972 through the present, the Goleta Water District and defendants acting in concert have adopted resolutions which continue and maintain the purported purpose of restricting increased water consumption.

30. RE: ABSTENTION — No sensitive social policy exists, no difinitive ruling on a state issue would avoid the constitutional adjuication and no determinative issue of state law would remain in doubt should this Federal Court decide the issues.

31. To the plaintiffs, these constitutional issues of our Civil Rights, and Inverse condemnation are as TRULY NECESSARY AS ANY ISSUE. We are not asking for a review of various local and technical water supply and demand issues. *IT IS THESE ISSUES,* that have brought about the basis of this complaint which is a violation of the plaintiffs Civil Rights, due process of law, and 11 year denial of use of the plaintiffs property even to the growing of a garden.

32. Mandamus is not the remedy when a property right and injury has been brought to the landowner. Civil Rights have been denied to the injury of the plaintiffs.

33. State Courts don't rule on Civil Rights and constitutional questions. This is the purpose of the Federal District Courts. The remedy lies in, *JUST* compensation

for the 11 year injury and denial of the plaintiffs constitutional rights, 5th and 14th amendments.

34. The Acts of the defendants as alleged do not touch a sensitive area of Social Policy. This complaint involves NO complex sensitive, and unsettled issues of state property and land use regulation. Authorized land use Planning is not in issue, the land planning alleged *is the result of defendants' acts and omissions.* It is conceded and pleaded that the County of Santa Barbara is empowered to enact land use planning in Goleta Water District.

35. What the defendants are NOT empowered to do is to use a declared water emergency and enacted moratorium in place and instead of lawful land use planning mechanisms. The determination of whether defendants have deprived plaintiffs of constitutionally protected rights do not turn on any sensitive social policy recognized by law.

36. No state issue exists, the solution of which would terminat the controversy. We are actual consumers in the legal sence! There is no challenge that state law is unconstitutional or that the declared water emergency and enacted moratorium are facially invalid. This case turns on the acts and omissions of entities and individuals that resulted in the deprivation of constitutional protected rights, the violation of plaintiffs' cival rights as well as inverse condemnation.

37. While it is an appropriate act of the court to abstain from jurisdiction in order to avoid unnecessary interference with state regulatory schemes NO STATE REGULATORY scheme is involved in this complaint.

39. Plaintiffs have not challenged the right of a public utility district to lawfully declare a water "emergency" condition to exist or to enact a moratorium pending the resolution of the "emergency condition. Nor have plaintiffs challenged any lawful act of the county in exercising its land use planning or zoning powers. Therefor, with out some specific determinative issue of state law remaining to be resolved plaintiffs', complaint is properly before the Federal court.

40. The points of Abstention and statute of limitations was recently argued in the Lockary vs. Kayfits in the No. District Court on basicly the same issues; 1/20/1984 Civ. No. 82-6191 SW. The Court ruled in favor of the plaintiffs and it is soon to be set for trial.

41. No sensitive area of social policy exists, No state issues exists that would avoid the constitutions adjudication to the plaintiffs their claim is of our constitutional issues of civil rights, and inverse condemnation. THESE ARE TRULY NECESSARY AS ANY ISSUES.

FIRST CLAIM FOR RELIEF

42. BUTTE COUNTY WATER USERS ASSOCIATION (A Corporation) et. at. Petitioners, v. Railroad Commission of the State of California, Respondent

(Sec. No. 3111 In Bank Feb. 28, 1921

(4) "RELATIONSHIP OF CONSUMERS — ACTUAL DELIVERY OF WATER NOT ESSENTIAL. — "Where owner of land have contracted with water company for services of water for irrigation purposes, such owners become consumers, if the company has authority to admit them as such, and it is not necessay that water

be actully delivered upon the lands to make them consumers in the legal sense."

43. Plaintiffs at all times were actual users of water, the water was on the property at the time of purchase, infact from 1958. The plaintiffs signed up and contracted for water service in 1966. At NO time were the plaintiffs "potential users of water. A temporary disconect during lot split and securing of plans and sewer connections ect. is not a permanant denial of water. The "sham" moratorium took from us our property right, a violation of the United States Constitution according to the 5th amendment. The disconection was for the sole purpose of allowing the plaintiffs to perform major redevelopment of their property.

44. The plaintiffs relied upon the integrity of the moratorium, (that it would soon be over) and that a real shortage existed. The plaintiffs were decieved. Time and again the Defendants advised us that it would do NO GOOD to even apply for re-instatement of our water meter which is still on the property today. Defendants stated the moratorium encluded us and that we'd be wasting our money to ask the defendant to restore the flow of water to the plaintiffs property. Plaintiffs request was unlawfully denied by defendant.

45. As a direct result of the defendants acts and omissions as alleged herein the plaintiffs have been denied all reasonable use of their property except to pay taxes toward the support of the defendant, Goleta Water district.

46. California does not have a statute of limitations for inverse condemnation or civil rights violations. It was

only in 1982 that the plaintiffs realized the defendants intention to permanently damage the plaintiffs property. "Federal Law a cause of action generally begins when the plaintiffs knows or has reason to know of the injury which is the basis of his action." Cline vs. Brusett 661 F.2d 108-110 (9th Cir. 1981). There is no way the plaintiffs knew or could know that a moratorium which is supposed to be temporary and quickly remedied would in essence become law and cause civil rights violations against the defendants. We had relied fully on the integrity of the defendants.

47. Defendants actions were and are unlawful and without justification in that defendants has taken plaintiffs property without just compensation in reliance on a sham water emergency moratirium. Defendants actions constitute a continuing wrong.

SECOND CLAIM FOR RELIEF

49. Plaintiffs repeat, replead, and reallege as though set forth in full herein each and every allegation contained save paragraphs of refernce.

50. Defendant's alleged water shortage emergency is and was a sham and without any basis in fact and was declared for the purpose of supporting an unlawful moratorium and preventing the development of real property within defendant's boundaries.

51. Defendant has denied all of plaintiffs' requests to renew plaintiffs water service pursuant to the sham wather emergency moratorium.

52. Defendants possesses only a limited governmental authority and may only take such action as does not conflict with its statutory powers with provisions of the State and Federal Constitutions. Defendant, possesses the power of eminent domain.

53. Defendant, pursuant to state statute has a public duty to insure that water is not wasted but conserved for the highes and best purpose—DOMISTIC use. Plaintiffs have a clear, present, and beneficial right to the performance of said duties.

54. Defendants, have a clearly mandated administrative duty to provide water service within district in furtherance of the State's stated policy promoting the maximum use of water resources.

55. For over 11 years now and continuing throughtout the present, defendant, has adopted resolutions declaring a water "emergency" to exist and imposing a moratorium on re-instatement of plaintiffs existing water meter yet they have granted new meters to whom so ever they will.

56. State statute grants defendant, Goleta Water District, the limited power to "declare a water shortage emergency condition to prevail within the area served by such a distributor whenever *it finds and determines* that the *ordinary demands* and requirements of water consumers cannot be satisfied." Calif. Water Code 350 (emphasis added).

57. Plaintiffs, while having a knowledge of the declared "emergency" and moratorium, acted in good faith reliance upon the superior knowledge, expertise and relative position of the utility district. Plaintiffs also relied

upon the good faith belief that an "emergency" reflected a short-term condition and that they would one day be permitted to re-develop their property. Plaintiffs could not have learned until sometime after application in writing was made to the defendants, of their purpose and intent to permanently deprive them of their property.

58. It was only after the "emergency continued for more than 11 years with defendant failing to provide plaintiffs any opportunity for meaningful participation that plaintiffs, knew or could have learned that defendant, had NO intention of ever permitting plaintiffs reasonable use and enjoyment of their property.

59. Since plaintiffs application we have learned that the district has provided and continues to provide water to a population which has increased since the "water emergency" moratorium was first declared.

60. That defendants while emposing and maintaining an emergency moratorium, has sanctioned and adopted a policy and practices of providing water for other than the ordinary demands and requirements of the consumers being served at the time of the imposition of each and every resolution continuing the moratorium.

61. Plaintiffs did not know until after 1982 that defendants have sanctioned and adopted the acts which deprive and did deprive the district of water sources and ultimately did restrict development of water sources with the purpose of insuring that plaintiffs would never be permitted to redevelop their property.

62. Defendant, by applying the moratorium to the plaintiffs and their property, has pervented plaintiffs from

making any and all reasonable use of their real property and property rights without the payment of Just Compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

THIRD CLAIM FOR RELIEF

63. Plaintiffs repeat, replead and reallege as thought set forth in full each and every allegation contained in the previous paragraphs, save and except such other paragraphs which incorporate by reference.

64. In doing the things alleged herein defendant acted under color of state law. It enacted and enforced its water hook-up moratorium and in so doing deprived plaintiffs of their right to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States and just compensation for the taking of their property under the Fifth Amendment to the constitution of the United States.

WHEREFORE, plaintiffs pray for judgement against defendant as follows:

1. Damages for violation of plaintiffs' civil rights;

2. A determination of anward of the actual damages to plaintiffs' property and interest proximately resulting from defendant's conduct;

3. interim damages for the temporary taking of plaintiff's property;

4. an order permanetly enjoining defendant from the violations of the law;

5. an order directing defendant to provide plaintiffs with water;

6. interest at a prevailing market rate;

7. costs of litigation, including a reasonable attorney's fee; and

8. such futher relief as the Court considers just and appropriate.

DATED: August 24, 1984

Respectfully submitted,

By .....
A. Frank McMillan
In Propria Persona

By /s/ Gladys Bottroff McMillan
In Propria Persona

DEMAND FOR JURY TRIAL

Plaintiffs herin pursuant to the Rule No 38(b) of Federal Rules of Civil Procedure hereby demand trial by jury.

DATED: August 24, 1984

RESPECTFULLY SUBMITTED;

A. Frank McMillan In pro per

/s/ Gladys Botroff McMillan In Pro Per

EXHIBIT NO. 1 NOT REPRINTED

EXHIBIT NO. 2 NOT REPRINTED

EXHIBIT NO. 3

ATTACHMENT A

A Frank McMillan

Acct. No. 001-226

Year	Water Use History Hundred Cubic Feet	Year	Water Use History Hundred Cubic Feet
1982	-o-	1967c.	-o-
1981	-o-	1966d.	13 HCF 0.029AF
1980	-o-	*1965	141 HCF 0.32AF
1979	-o-	*1964	197 HCF 0.45AF
1978	-o-	*1963	153 HCF 0.35AF
1977	-o-	*1962	233 HCF 0.53AF
1976	-o-	*1961	268 HCF 0.61AF
1975	-o-	*1960	329 HCF 0.75AF
1974	-o-	1959e.	67 HCF 0.15AF
1973a.	-o-		
1972	-o-		
1971	-o-		
1970	-o- Need water use during this period to qualify		
1969	-o- activating meter see Section 9, Ord. 72-2(A-2)		
1968b.	-o-		

Notes:

a. 3 April 1973, Leak in meter box—District side of meter—B.S. #35715

b. 31 Oct. 1968—New meter installed "O" read

c. 9 June 1967—Meter turned off

d. 18 Mar. 1966—F. McMillan signed up—7 HCF use in Apr-May; 6 HCF prior

e. 4 Sept. 1958, Meter installed for Fannie Stevens

*1960-1965: 1321 total HCF ÷ 6 = 220 HCF/yr./Avg
220 HCF ÷ 435.6 = 0.50 AF/yr/Avg

EXHIBIT NO. 4

Illegible

GOLETA WATER DISTRICT
P.O. Box Illegible

Illegible

12 November 1982

A. Frank McMillan
P.O. Box 321
Palm Springs, CA 92262

We have carefully reviewed the information contained in and attached to your letter of 2 November 1982. It confirms the existence of the economic problem you clearly presented to the District Board of Directors on 7 October 1982. It does not present a new situation that was not considered by the Board when they reviewed your request to reactivate the water meter at 576 Apple Grove Lane in Santa Barbara.

In my opinion the Board of Directors understood your difficulties and carefully weighed them in compliance with the laws, rules, and regulations under which the District operates. With nothing new to present, I do not believe the Board would change their decision. Therefore I do not believe there is a reason to schedule another session with the Board of Directors on this matter.

/s/ Lloyd C. Fowler, P.E.
General Manager & Chief Engineer

EXHIBIT NO. 5 NOT REPRINTED

EXHIBIT NO. 6

GOLETA GAZETTE

Vol. 4 No. 3 October 1983

CITIZENS FOR GOLETA VALLEY
Endorses
DONNA HONE & DAVID PERI
FOR GOLETA WATER BOARD

The Citizens for Goleta Valley, representing over 400 concerned families, has endorsed DONNA HONE & DAVID PERI for election to the Goleta Water Board. We invited all candidates to be interviewed, and checked the voting records of incumbents.

Of the eight candidates running, we found only Hone and Peri committed to uphold the voter approved Responsible Water Policy.

DONNA HONE: A Record To Be Proud Of.

Donna Hone is currently Vice-President of the Goleta Water Board. She was appointed a director in 1977, and was elected to the office four years ago.

Mrs. Hone has played a crucial role in many environmental and local government issues, beginning in the early 1970's when she helped form the Goleta branch of the American Association of University Women.

After witnessing the destruction of agriculture in Goleta in the late 1960's, she helped organize the Citizens for Responsible Water Policy in 1972. This group wrote and successfully passed the Responsible Water Policy Initiative in 1973, which stated that the Water Board could not continue overdrafting our water basins.

Donna Hone's concern for preservation of agriculture led to her appointment by the Governor to the 19th District Agricultural Association board of directors. Donna, her husband Dan, and their three children live in the north Patterson Avenue area.

DAVID PERI: Committed to Community Service.

David Peri is a local Certified Public Accountant. He is a native Goletan and attended Goleta Union School, Hope School and San Marcos High School.

The Peri Family has been involved in local agriculture for many years. A graduate of Cal Poly in San Luis Obispo, Mr. Peri has been an active leader in Goleta 4-H programs. He was appointed by the Governor to serve on the 19th District Agricultural Association, where he was elected President of the Board for 1983.

In 1981, David Peri was President of the Channel Counties Chapter of the California Society of CPA's. He has served as board member and treasurer for many community service organizations, and has been an active participant in campaign reform, assisting many candidates with proper campaign finance disclosure.

David and his wife, Catherine, were responsible for the Marymount School Benefit Auction for two years. The Peri's have four children, ages 2 to 19.

THE RECORD IS CLEAR

For ten years, the voters have consistently made their wishes clear. The current Water Board majority has worked hard for groundwater protection, local water sources, conservation and limited growth for Goleta.

Donna Hone told us this about the future:

"While only the voters can remove the Responsible Water Policy from the books, the elected directors must respect that law. There is no doubt that developer-controlled candidates would find a way to start issuing more hook-ups. This would lead to a call for importing State Water as local supplies ran out, something the development interests have been pushing for years."

The Citizens for Goleta Valley is working to keep our Water District under citizen control, not special interest control. We urge you to vote November 8th for Donna Hone and David Peri. You can also support our work by returning the coupon on the back of this Gazette.

DEVELOPER-BACKED CANDIDATES

The voting record of the developer-backed Water Board members, Weaver and McFarland, makes it clear that control of the Board by development interests would make a big difference.

Imagine this scenario: Board control changes hands —the voter approved Responsible Water Policy is "re-interpreted"—unlimited new water hook ups are permitted by overdrafting our groundwater basins—the Water Board commits Goleta to importing costly State Water as the "only long-term solution"—instead of the modest increase in housing and population seen in the last several years, rapid new development is permitted—accompanied by horrendous traffic congestion, smog and much higher water bills.

Of several so-called "independent" candidates, Henry Schulte seems the least independent. According to Fair

Political Practice reports, Schulte is being backed by all of the same major developers who supported him on the pro-growth slate two years ago. Lack of big new water supplies is about the only thing keeping much agricultural land (including the Schulte Ranch) from growing condominiums instead of avocados. The Citizens for Goleta Valley is skeptical about putting control of our water resources in the hands of major landowners. The potential for conflict of interest is too great.

The present Board philosophy, supported by Donna Hone and David Peri, will keep our water supply secure, our water bills low, and our community protected from overdevelopment.

More Development [Does Not Equal] Lower Housing Costs

In theory, housing costs should go down as more units are built. However, the experience of most other coastal communities in California doesn't support the theory. Fast growing areas in Los Angeles, Orange and San Diego counties have home prices that have risen just as fast and as high as here on the South Coast. Building hundreds of thousands of new units will not guarantee lower housing costs in Goleta. The record on the cost of rental units is the same.

JOIN US—Citizens for Goleta Valley

——Enclosed is a contribution of $.....
(All funds will be used by Citizens for Goleta Valley to help elect Donna Hone and David Peri to the Water Board.)

——I will help deliver the *Goleta Gazette* in my neighborhood. Call me.

Name ..... Phone .....

Address .....

City/Zip .....

Mail to: Citizens for Goleta Valley
Lynn Altizer, Treasurer
P.O. Box 1564
Goleta, CA 93116

Thank You!

EXHIBIT NO. 7 NOT REPRINTED

Supreme Court, U.S.
FILED
FEB 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1150

In the Supreme Court
OF THE
United States

OCTOBER TERM 1986

A. FRANK MCMILLAN and
GLADYS BOTTROFF MCMILLAN,

Petitioners,

VS.

GOLETA WATER DISTRICT; EDWARD G. MASCHKE;
PATRICIA SHEWCZYK;
DONNA O. HONE; DONALD W. WEAVER; JACK D.
WALKER; and LLOYD C. FOWLER,

Respondents.

On Cross-Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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To the United States Court of Appeals
For the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

This Brief for Respondents in Opposition to Petitioners' Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is based chiefly upon the Petition for Writ of Certiorari filed on December 9, 1986, by the Goleta Water District, *et al.* (Respondents herein) as Petitioners, No. 86-985.

STATEMENT OF THE CASE

The "statement" of this case and the "facts" have been set forth three times before this Court, once in the Goleta Water District's Petition for Writ of Certiorari, and twice more by the Respondents thereto in their Opposition Brief and by them as Petitioners in their Cross-Petition for Writ of Certiorari, to which this Brief is addressed. We respectfully request the Court to consider the two proceedings as consolidated so that we may adopt the "Statement of the Case" and "The Facts" as set out previously in the Goleta Water District's Petition as though fully set forth at length herein.

ARGUMENT

Point I

The McMillans State No "Taking" Claim

The gist of the argument made by the Cross-Petition is a simple disagreement with the application of the precedent-setting case of *Hollister Park Investment Co. v. Goleta County Water District [1978]*, 82 Cal.App.3d 290. The McMillans' argument is based upon the assertion that they "are not asserting a compensable property interest in water," but are seeking to protect their property right to "make reasonable economic use of their property." (Cross-Petition, pages 7-8) This argument is pure sophistry; it is a distinction without a difference. The McMillans' litigation is based upon the fact that the water moratorium passed by the voters of the Water District in 1973 prevents them from getting water to their property. They seek damages in inverse condemnation. *Hollister Park* bars the action if they are "potential water users."

POINT II

The McMillans State No Substantive Due Process Claim

The McMillans are attempting to change horses in midstream. The action they brought is for inverse condemnation and it is controlled by *Hollister Park.* The McMillans make the same argument here in the federal jurisdiction that was made in the state courts in *Hollister Park,* to wit: that the ordinance/initiative represents a no-growth policy. That argument misconstrues the ordinance and the initiative. They do not prohibit the acquisition of new water sources; to the contrary, they mandate that the District seek new sources of water. If the McMillans believe that the District has not sought new sources of water or that the continuation of the moratorium is a sham, then their remedy is in a petition for mandate. *Hollister Park, supra,* page 294.

The McMillans have turned an obvious and simple remedy into a constitutional challenge; they claim a denial of due process. That theory is not useful on these facts. There is no constitutional irregularity here — only an attempt by the District to meet the mandate of the voters as decided in 1973. If the District Board has not met the requirements, the McMillans can make the election of remedies provided in *Hollister Park.*

POINT III

Summary Judgment on the Equal Protection Clause Was Entirely Proper

The McMillans urge that there were insufficient facts to support the Court's conclusion that there was no violation of their equal protection rights.

Unaccountably, the McMillans raise objections to the District's moving papers for the first time, on this, their Cross-Petition. They claim that the District's moving papers were "conclusionary," that it refers only to "Mr. McMillan" and that the District's evidence only refers to those who are "similarly situated." The McMillans now claim that the declaration should have also referred to "Mrs. McMillan" and that a reference to those "similarly situated" should have said they were treated in the same fashion as other persons who own residential property. Thus, the McMillans conclude that the District's evidence does not conform to Federal Rules of Civil Procedure, Rule 56(e).

The fact of the matter is that the District's moving papers were never challenged by the McMillans or their counsel heretofore. Neither the District Court nor the Ninth Circuit had any reason to review the sufficiency of the documentation. The issue, if there is one, is too late to raise at this juncture.

More important is the fact that the Cross-Petition did not carry the burden imposed by the same rule, 56(e), upon which they have relied. That authority requires that the McMillans, in their response, "must set forth specific facts showing that there is a genuine issue for trial." They simply didn't do that. Moreover, they made absolutely no effort in their Cross-Petition to present any facts that would demonstrate that there was any genuine issue to try except to point to:

1. Campaign literature apparently circulated by various candidates for office to the water District Board of Directors, and

2. A ballot argument that was written by counsel for the District that indicated that the 1973 morato-

rium was designed to balance water demand with water supplies.

Surely campaign literature published by enterprising candidates for public office can hardly be interpreted as proof of anything. Indeed, to point to such "evidence" is patently absurd.

The comment by the Water District counsel is equally unpersuasive. Indeed, the statement is a reflection of the conclusion stated by the *Hollister Park* court when it said that the "initiative represents a moratorium upon new service connections during drought conditions while a feasible and financially acceptable plan for expansion is developed." (*Hollister Park, supra,* page 294) Such "evidence" is hardly proof that the moratorium was enacted and continued in furtherance of an illegitimate "no-growth" policy.

In summary, the "proof" offered by the McMillans was correctly characterized by the Ninth Circuit as pure "speculation."

CONCLUSION

The Respondent, Goleta Water District, respectfully requests that the Cross-Petition for Writ of Certiorari be denied.

Dated: February 3, 1987.

Respectfully submitted.

THOMAS P. ANDERLE
Attorney for Respondents

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 9, 1987, I served the within Brief for Respondents in Opposition in re: "A. Frank McMillan vs. Goleta Water District" in the United States Supreme Court, October Term 1986, No. 86-1150;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Timothy A. Bittle
Ronald A. Zumbrun
Robert K. Best
Counsel of Record
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Attorneys for Respondents

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 9, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA